IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION NO. 5:14-CR-00244
vs.	:	
DONALD L. BLANKENSHIP,	:	December 17, 2014
Defendant.	:	

MOTIONS HEARING

BEFORE THE HONORABLE IRENE C. BERGER
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography; transcript produced by computer.

P R O C E E D I N G S

THE CLERK: The matter before the Court is the *United States* vs. *Donald Blankenship*, Criminal Number 5:14-CR-244, scheduled for motions hearing.

THE COURT: Good morning, everyone.

Counsel, would you note your appearance for the record, please.

MR. RUBY: Good morning, Your Honor. Steve Ruby for the United States.

MR. MCGINLEY: Good morning, Your Honor. I'm here on behalf of News Media Intervenors, *The Wall Street Journal*, *The Charleston Gazette*, *West Virginia Public Broadcasting*, *National Public Radio*, and *The Associated Press*.

MR. TAYLOR: William Taylor on behalf of Mr. Blankenship.

MR. BROWN: Good morning, Your Honor. Blair Brown on behalf of Mr. Blankenship.

MR. HERMAN: Your Honor, Steve Herman on behalf of Mr. Blankenship.

MR. TINNEY: Good morning, Your Honor. Jack Tinney on behalf of Mr. Blankenship.

THE COURT: Good morning.

All right, counsel, and particularly Mr. McGinley, I want to address your motion first.

Let me place on the record that I've reviewed your written submissions, and I want to give you an opportunity to place any argument on the record that you want. But preliminarily I want to address the issue of intervention.

In looking at that issue, I will candidly say to you that I did not find any cases within the Fourth Circuit or any procedural rule that would permit intervention in a criminal matter, but I did see cases to that effect in other circuits.

And because I believe that your clients have standing certainly to complain about the issue, I want to be able to get to the merits. And, so, given that case law that I saw outside of the Fourth Circuit of intervention in criminal matters, I am going to grant the motion to intervene for the limited purpose of addressing the issue of the order which was entered on November the 14th of this year.

So, with that preliminary issue taken care of, Mr. McGinley, I'm happy to hear your argument relative to the First Amendment issues you've raised with respect to the November 14th order.

MR. MCGINLEY: Thank you, Your Honor.

And I'll just say in regard to standing, I did that research as well. You know, the, the rules just don't address this particular situation. I don't think they address it one way or the other. But the case law, I think,

is, is pretty clear that it's, it's a matter of constitutional standing under the First Amendment when the press, the press has a right to challenge these types of orders. And traditionally it's been done through the mode of intervention even in criminal cases.

So, I -- that's, that's where I was coming from. I didn't find any Fourth Circuit precedent as well, but I didn't find any contrary precedent anywhere.

THE COURT: Don't get me wrong. I do not believe there is any issue with respect to standing. I was looking for the procedural vehicle to use to assert that standing.

But, again, even though I found nothing in this circuit in terms of precedent for allowing intervention in a criminal matter, I did find it outside of this circuit. And I am going to grant the motion to intervene for that limited purpose because I think the issues are important to be addressed. And there is no doubt about the issue of standing in my opinion.

MR. MCGINLEY: Thank you, Your Honor. I appreciate that.

Let me get started first by saying that -- just to give a little background on, on why we're here. My clients are press organizations. And, as such, they have First Amendment rights of news gathering which is a protected right pursuant to the First Amendment.

I think the case law also is clear that that First Amendment right of news gathering applies to not just civil cases, but criminal trials as well. A major purpose of the First Amendment is to protect the free discussion of government affairs. The Constitution protects the press's right to receive information and ideas from willing speakers. So, that is why we're here.

There's two parts to the Court's order that my clients are challenging. One is the gag order on trial participants, court personnel, victims, victims' families, the, the breadth of the order. And it impacts on the press's ability to receive information from willing speakers.

The gag order obviously is a prior restraint on speech. And, therefore, it's subject to strict constitutional scrutiny. The fact that the order extends to restrain speech beyond trial participants to actual and alleged victims and their families in, in our view shows that the gag order is overbroad on its face.

The, the speech of persons who aren't trial participants can only be restrained, the case law says, when it's absolutely necessary to preserve a fundamental right. And that happens in very, very rare circumstances. And the standard of being absolutely necessary, obviously, is about the highest standard that can be applied.

Speech can be restrained by a court only if there's a showing that the specific speech being restrained poses a certain direct and imminent threat to a fair trial right or other constitutional interest. That's, that's from the case law.

The Court's order which was entered the day after the indictment refers only to the fact that there had been pre-trial publicity. So, certainly in the order -- and this is not to suggest that what the Court was attempting to do in, in creating a fair and impartial jury is something the Court should not be concerned with. But the, the reasons for the -- stated in the order for imposing the gag order of just pre-trial publicity is not in and of itself enough to impose a gag order.

The -- in order to impose a gag order, there has to be a showing of a certain direct and imminent threat to a fair trial or other constitutional interests. And that's the *CBS* vs. *Young* case.

Imposition of a gag order requires a showing and findings by the Court that there also are no adequate measures, alternative measures that can mitigate the effects of pre-trial speech. And the Court's order doesn't address that possibility either.

The Court must have a record before it in which findings are made that the restraint of speech will

effectively prevent the demonstrated harm.

So, on the one hand, there has to be a showing that there is going to be a demonstrated harm by the speech. But it also has to be shown that the gag order would, in fact, be effective to prevent that particular demonstrated harm.

And we don't think that that is the case, certainly not at this stage of this criminal trial that there's a record or a showing or, that exists here in this case.

The record also must be supported by findings by the Court that without a restriction on the extrajudicial speech that there's a reasonable likelihood of prejudicing a fair trial. The reasonable likelihood standard is a very high standard. And it's -- the case law shows that it's only met in very unusual circumstances, unusual cases.

Restrictions on speech have to be -- additionally have to be narrowly tailored to prohibit only those statements that are likely to threaten the right of a fair trial or of an impartial jury.

Here the Court's order is -- as applied is very broad and applies to any discussion about the facts or circumstances of the case and isn't narrowly tailored to address whatever prejudicial speech might be out there.

The same type of standards apply to a, to an order sealing the court file, although I think that the cases also show that I think the standard is actually higher for

sealing court records, you know, especially an umbrella order as here where every filing is being, being sealed. The record has to support a finding that without the restriction, there would be substantial probability that a compelling interest would be prejudiced.

In criminal cases the case law says there is a presumption in favor of openness. And this right of public access again springs from the First Amendment. The presumption of openness can be overcome only on the basis of specific judicial findings -- and this is the *Charlotte Observer* case -- that there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity; also, that there is a substantial probability that the closure would prevent the prejudice; and, three, that reasonable alternatives to closure can't adequately protect a defendant's fair trial rights.

So, again, the, the standards that are applied to determine whether a gag order should be imposed are similar to those in regards to sealing court records, although I think with court records, you know, it's, it's somewhat different because the Court then has an ability and responsibility to review each particular filing to determine whether or not it would be something that could, if revealed to the public or to the press and reported on, would prejudice the defendant's rights to a fair trial.

Again, like the gag order, denial of access to records must be narrowly tailored to serve a compelling government interest. And that's the *Shelton* vs. *Tucker* case, and also *Doe* vs. *Public Citizen*.

The presumption of public access can be rebutted only by a showing in the record that countervailing interests heavily outweigh the public interest in access. There has to be a showing that there's -- any restriction on access will be effective to prevent the threatened interest for which the limitation is imposed.

Again, these are the same -- in regards to the sealing of court records, it's the same type of standard that's applied to the gag order. The consideration of all those concerns have to be on the record, must occur on a case-by-case examination of all the competing interests at stake.

Again, this is not to say that what the Court was attempting to do in its order is not something that's proper for the Court to be concerned with. Obviously, the defendant's Sixth Amendment and rights to fair trial are important and the Court needs to consider those things.

But the U.S. Supreme Court in the *Nebraska Press Association* case -- and I'll quote -- "Pre-trial publicity, even pervasive adverse publicity, does not inevitably lead to an unfair trial."

So, the simple fact that there has been a great deal of publicity surrounding the Upper Big Branch tragedy and there was publicity when the Government filed the indictment doesn't lead inevitably to an infringement on the, on a defendant's right to a fair trial. And that is the basis that is on the record that's cited in the Court's order for the sealing and gag order.

The Fourth Circuit has held that even where there is persuasive substantial inflammatory publicity surrounding a trial, a closure order still might be impermissible. I've cited in my brief the *Skilling* case which is a recent case where the U.S. Supreme Court held that juror exposure to news accounts of prominent crime does not presumptively deprive a defendant of due process or prejudice, or the partiality in a jury pool.

I've cited also the *CBS* vs. *Young* case which is the case that arose out of the Kent State shootings where a similar gag order was entered in that case, albeit it was a civil case. But the, the Court, the Court of Appeals found that that was a -- one of the broadest types of gag orders that, that could be imposed and reversed it and did not impose a gag order in that case.

And, again, in the Fourth Circuit there is the, the *In Re: State Record* case which discusses the Court's obligation to review the documents. When there's no showing that a

particular document will prejudice the proceedings, the sealing order is overbroad.

And, you know, I understand again what the Court was attempting to do. But in this case, for example, there are notices of visiting attorneys, those types of things. So, I think presumptively the Court's order sealing everything in the file, I don't -- you know, those types of things wouldn't prejudice a trial. It's, it's presumptively overbroad because it applies to everything and doesn't do a particularized examination.

Again, it has to be effective to prevent the harm that is being directed at the -- by the gag order and the sealing order. Here I think that the harm that the Court is directed at in attempting to ensure that the juror pool is free from bias is, is an appropriate concern of the Court, but here we also -- the fact -- pragmatically the fact is that this is the subject of news reports over four and a half years, four extensive government investigations, countless media reports already.

So that the closure of the court file and the gag order can't go back and put all that back in the bag. I mean, the information is already out there and already exists. If that's -- if that is actual, actually an issue, the, these things won't be effective to change any of the things that have already happened and the publicity surrounding these

events that occurred prior to the indictment.

The, the case law also requires that before a gag or sealing order can be imposed, the Court also must consider what, whether alternative measures that are less restrictive would be effective before infringing on the press's First Amendment rights to gather news.

The Court must consider things such as more careful measures in jury selection, more intense *voir dire* in order to avoid prejudicial effects of adverse publicity. And, again, that's the *Nebraska Press* case from the U.S. Supreme Court.

Other alternatives that the Court could use in this case include, you know, the instructions to the jury about what they are listening to, sequestration of a jury, use of a larger jury panel, and even a change of venue.

Again, the, the order isn't narrowly -- it is very broad. It's not narrowly tailored. It applies to all statements, not just those that might prejudice the defendant's right to a fair trial.

It applies to all filings, regardless of content, regardless of whether the filing would, in fact, prejudice the defendant's right to a fair trial.

And, lastly, I think the Court needs to consider the public interest. And while the defendant's right to a fair trial certainly is something that is a, a significant

interest, so is the First Amendment right of the press and also the public interest in receiving information about this case. Keeping the public accurately informed about the case is in the public interest.

I've cited in the brief a quote from Justice Powell in the *Nebraska Press Association* case that press reports contribute to the public's understanding of the rule of law and to the comprehension of the functioning of the entire judicial system. Again, that's why lifting the gag order and the sealing order would be in the public interest.

The -- as the order now stands, it creates a barrier to the public's full understanding of the, of the important and newsworthy events in this case.

And, lastly, there's a recent case in the U.S., in -- I'm sorry -- the Court of Appeals for the Fourth Circuit, the *Doe* vs. *Public Citizen* case that addresses, again, the, that it is sometimes better to have these issues out in the open, increases public access, promotes trustworthiness in the judicial process, provides the public with a complete understanding of the judicial system, and a better perception of fairness.

And for all of these reasons, my clients, the press intervenors here, would ask the Court to reconsider the November 14th order and vacate it and lift the restrictions.

THE COURT: All right. Mr. McGinley, I want to

make sure -- I think you have carefully gone through most of the arguments that you presented in your written submission. I want to make sure that I understand your points, and I want to address first the issue of alternatives.

You have spoken about alternatives which, in my opinion, may or may not be alternatives for the Court at this point. And, so, I want to give you an opportunity to address those.

When you speak about additional jurors or the *voir dire* process, of course we do that in every case to try to ensure that there is a jury that can sit fairly and impartially for both the Government and the defendant. But you also speak, as does some of the cases, to the alternatives of sequestration and a change of venue.

When we think about sequestration, of course, that's after we've been able to impanel a jury. So, I have some concerns about whether or not that is really a viable alternative for the Court's consideration at this point.

And, secondly, when we think of a change of venue, generally that is something that occurs only after the Court finds that the panel is such that the defendant cannot get a fair and impartial jury.

And, so, it appears when we look at that as a so-called alternative, it only comes into play after the damage is done.

So, as to whether or not that is a, quote, viable alternative or not, I have some question in my mind as well. And, so, I want you to -- I want to be candid with you in my consideration of those issues as alternatives and give you an opportunity, if you would like, to address those on the record.

MR. MCGINLEY: Sure, Judge. I think -- and you're right. Sequestration as just an alternative, I think, is more, more appropriately addressed at the time of trial and whether or not the Court would, a Court would find that the, whatever is going on at the time of trial requires sequestration of jurors. I mention that only as an example of the types of alternatives that courts consider under, under particular circumstances.

Primarily, though, the, the most important alternative is a more exacting *voir dire*. Again, not to say that courts don't engage in an exacting *voir dire* in every case, but certainly the, the alternative of using a larger juror pool and going beyond what we would ordinarily do in *voir dire*, taking more time, taking more jurors, those are the primary alternatives available to the Court that is a less restrictive means.

Insofar as the change of venue is concerned, I, I agree with you that that certainly is something that only occurs after the Court would determine that there is a showing that

the jury panel or pool is, is sufficiently biased or there's some other issue that requires the Court to move. Primarily again, though, although I do think it is an alternative and a less restrictive means than the order that the Court is using at this point.

I don't think that -- if you, if you step back to the initial analysis, I don't think we, we get to that at this point because I don't think we have a record or a showing that I can see that, that requires a gag or sealing order at this point in the proceedings.

But, primarily, again, it's the *voir dire* I think is the most important and most effective way and the less restrictive alternative that the Court has to ensure that the jury pool and jury panel is not biased.

THE COURT: When we talk about the change of venue as an alternative, you mentioned earlier in your argument about the public's interest in having access to the information. And it appears when we look at the law that there is somewhat of a preference, and I use that word somewhat loosely, Mr. McGinley, for these trials to take place in the district in which the defendant is indicted.

There is a public interest there as well, so that I believe the public who has the most interest in the issues which are the subject of the indictment have the ability to attend a trial, which may not be the case if the Court had

to order a change of venue.

I think that that is also a public interest that really hasn't been covered so far in either the written submissions or the argument. That, again, I want to lay on the table for you and tell you that it is something I've given consideration to. And I want you to be able to respond to that if you choose to do so.

MR. MCGINLEY: Absolutely, Your Honor. And I don't disagree with anything you say. The, the -- I, I think the case law absolutely evidences a preference to keep the trial in the district. Don't get me wrong. I'm not suggesting that there's any basis at all for a change of venue in this case.

THE COURT: And I didn't mean that you were. But when the case law -- and when you talk about change of venue as an alternative, I think it's also important to look at what that does to that public interest that you also argued earlier.

MR. MCGINLEY: There's no doubt, Judge. I think the public interest in keeping this, this case here is very strong. I think that there is no reason for a change of venue.

I agree that's -- it's -- all I was doing is comparing and weighing, and that's ultimately the job of the Court, but to compare and weigh whether there is a less restrictive

means than the gag and sealing order to accomplish the fair and impartial trial and keep the trial here. I understand that's, that's the heavy job that the Court has.

But from, from the, from the situation in this case, there is no, there is no reason to change the venue, but we also feel that the public interest in lifting the, the gag order and the sealing of the court records is also in the public interest and also heavily outweighs any other interests in, that could not be done but with a less restrictive mean.

And, frankly, I understand all of those things are, are items that the Court must weigh. But when balancing them all at the end of the day, I think the one that, that is the easiest to resolve is whether or not there should be a gag and sealing order. And that's what we think, that's what we think should be reconsidered and vacated.

And, ultimately, if there is a reason to change venue in this case, again, which I don't think there is, but if there was, it's because of the facts that are already out there in the public domain, the information that has already been published and revealed and disseminated. It's -- that's already out there. That's why I don't think the gag and sealing order meets the criteria of being effective to accomplish the Court's goal.

Again, not to say that there is a basis for a change of

venue. But if there was, it would be based on the pre-trial publicity, not on what trial participants or counsel or the record might reveal at this point, at this point in time.

THE COURT: Well, I agree with you. And you have listed in your memorandum in support, I think in a footnote over the course of a couple of pages, a list of the news articles that have appeared since the UBB mine disaster. There has been a lot of publicity.

I take it from your argument that if there were a need for a change of venue, that alternative that has been spoken about, that it would be based on that; that it is your position that with the return of an indictment that has specific charges in it and specific facts that are alleged that the publicity that would be drawn from that between the return of the indictment and the trial, which would be much more specific as it relates to this Court's ability to seat a jury than that which is heard previously, you do not believe that that would have more of a probability of resulting in prejudice than those more what I'm going to call articles which were general, more general prior to the return of the indictment.

MR. MCGINLEY: Judge, it's my position that it would be less.

THE COURT: Okay.

MR. MCGINLEY: I think having, having correct and

accurate information from those most knowledgeable about the case, the trial participants, victims, their families, rather than secondary sources, and also the, the reporting on what is actually occurring in the court, what's being filed, what's being argued, I think that decreases the chance of a, of a partial jury. I think it actually enhances the ability of the Court to have an unbiased jury panel --

THE COURT: All right.

MR. MCGINLEY: -- because the jurors -- one of the things I didn't speak about but I think we all understand that the Court -- the Sixth Amendment right doesn't mean that a defendant is entitled to have a jury of people who have been shut in and had their hands over their ears.

Jurors come to this court -- potential jurors come to this court having read newspapers, knowing something about the case. But it's -- the question is, knowing that and being instructed by the Court, can they be fair and impartial.

And, and in my experience, it's almost always possible for the Court to, using *voir dire* to, and asking jurors questions if they've read something, will that, will that bias them, will they take in the evidence fairly and not make a decision until the end of the trial, those types of -- and those types of questions can be expounded on if

there are additional concerns based on press reports about the pre-trial proceedings.

But I don't think it would rise to the level or there's any showing that it's necessary at this point. And, in fact, I think that having jurors who understand these issues and keep open minds is probably to the benefit of all parties in the case and the public interest.

THE COURT: Thank you, Mr. McGinley.

Counsel, is there any comments that either of you want to make on this particular issue or position that you want to take?

Mr. Ruby, I'll hear you on that.

MR. RUBY: Thank you, Your Honor.

I hope it goes without saying, Your Honor, that the United States shares the Court's concern about the importance of seating a jury in this district. And I'm confident that we're going to be able to do that.

The defendant hasn't, of course, filed a motion yet to change venue, but he's hinted and maybe even set outright in some of his filings, the filings that he has made that such a motion is coming. There's no motion yet to argue on that point, but I do want to, to tell the Court that we disagree strongly with the defendant's claim in his response to the news media motion that it will be impossible to seat an impartial jury here.

It's hard for me to imagine that out of all the eligible jurors in this district, which I don't know the number, Your Honor, but there are tens of thousands, hundreds of thousands probably of eligible jurors in this district that we can't find 12 who are able to consider the evidence in this case impartially.

THE COURT: So, is that a position -- all I want to know is if there is a position on this motion of Mr. McGinley's.

MR. RUBY: I understand, Your Honor. And I did want the Court to understand -- we didn't file a written reply to the defendant's response, but I wanted the Court to understand that we, we -- I hope, again, Your Honor, it goes without saying that we don't necessarily adopt the view that the defense has taken with respect to this motion.

Now, on our view -- on the United States' view on the motion itself, Your Honor, I will tell the Court this morning that regardless of how the Court rules, the United States doesn't intend to make statements to the press about this case. That's a position that we've decided to take in light of the concerns that have been raised by the Court regardless, as I said, of the outcome of this motion. And perhaps the defense will wish to join us in that position. Perhaps they won't. I don't know.

Given that decision on the United States' part, Your

Honor, which resolves, as a practical matter, the impact of the news media motion as it pertains most directly to us, we're not going to discuss this matter in the media no matter what the Court rules, then the United States is not taking a position on the remainder of the motion.

We recognize certainly the Court's concerns and the concerns that are raised by the news media, but we have confidence in the Court's sound exercise of its discretion of the balance of those interests.

THE COURT: All right. I just wanted to know if there is a position. Thank you, Mr. Ruby.

Is there a position by the defense on the motion that's on the floor?

MR. BROWN: Yes, Your Honor. Blair Brown on behalf of Mr. Blankenship.

We support the objective of the Court's order which is to obtain a fair and impartial jury in this case. I understand by your question that you would like to hear from us our bottom line position on this motion.

THE COURT: No, I don't want to hear your bottom line position. I'm not asking you to take one. I'm simply asking if there is one, and I'll give you an opportunity to present it if there is. But I am not forcing anyone to take a position.

MR. BROWN: No, I understand. I did not want to

suggest that, Your Honor. I'm just trying to respond to, to the questions you posed to the Government.

We -- I'd like to state our position so the Court knows what it is and then explain why we have that position.

Our position is as long as the case is venued here, we support the Court's order. We support the objective of the Court's order which is to obtain a fair and impartial jury.

But, however, due to the publicity in the case, due to the emotion of this case, we believe that that goal, that objective of a fair and impartial jury is not attainable here.

We're not -- we have not filed a motion to change venue. We will file a motion to change venue which will be supported. And we will ask the Court at the appropriate time after hearing from us and hearing from the Government to, to change the venue.

THE COURT: I think I understand that you support the order as long as venue is here within the Southern District of West Virginia. Is that an accurate summary of your position?

MR. BROWN: It is, Your Honor.

THE COURT: All right.

MR. BROWN: And if I could just briefly explain our position. Our position --

THE COURT: I don't want to hear or get into a

change of venue motion or discussion here today. But with that said, I'm happy to hear your reasoning.

MR. BROWN: Thank you, Your Honor.

Before, before the Court -- and I believe this is important to the Court's decision on this particular motion. But before the Court had issued its order but after the indictment had been filed, the Government widely disseminated the indictment.

Before the Court issued its order, elected officials from the entire State of West Virginia made inflammatory comments about the indictment and Mr. Blankenship.

Before the Court issued its order, there had been years of negative publicity, negative opinions that were broadcast, printed, blogged in every form of communication regarding Mr. Blankenship.

And, of course, there is the tragedy of the Upper Big Branch mine blast that we believe has affected the jury pool to such an extent that obtaining a fair and impartial jury here is impossible.

We all know from trying cases that jurors claim they will be impartial. And jurors, many of them, actually want to be impartial. But we believe -- and we will set forth this in far greater detail in our motion to change venue -- that it is impossible because of the emotion, because of the publicity, because of the history here to have a fair and

impartial set of jurors decide Mr. Blankenship's guilt or non-guilt in this case.

THE COURT: If I understand your position on the gag order further, with that statement you're saying that there is no step that this Court can take at this point that's going to ensure a fair and impartial jury on behalf of your client.

MR. BROWN: Other than transferring venue, that is correct. So, --

THE COURT: All right.

MR. BROWN: -- unless and until the Court transfers venue, we support the order in its current form.

THE COURT: Thank you.

MR. BROWN: Thank you.

THE COURT: Mr. McGinley, I will get you a ruling on your motion and I will try to do that quickly without -- I want to give some consideration further to your written submission as well as your points that you made here today.

Without doing that, however, without additional thought, there are, I believe when I look at the docket sheet, some matters that are probably not available to view that don't necessarily fall within the purview of the language of the order of November the 14th. And, so, I will look at those issues and address that as well.

MR. MCGINLEY: Judge, I wasn't served with a copy

of the defendant's response. And, so, this is the first time I've heard their argument. If I could just have two minutes, I think the Court probably knows what I'm going to say, but I'll go back to the response, again, deals with the pre-trial publicity.

THE COURT: Uh-huh.

MR. MCGINLEY: I don't think that there is a showing here or even an argument that the gag and sealing order, or either part of it, would be effective to prevent jury bias. The argument is all directed towards the pre-trial publicity.

My understanding is not that the press received the indictment from the Government, as was just suggested, but was actually put on the docket and was available for a period of time. And that's how -- and, frankly, I think the indictment should be available to the press. That, that is, you know, that's not something that I think is, is, should be even a question.

But, again, I don't think that that meets the standard that is required to impose a gag and sealing order. And that would be my only response.

THE COURT: All right. I understand that you and Mr. Brown agree on certain issues and depart thereafter. I think I understand both of your positions.

You all have a good day. I'll get you a ruling on your

motion and I will try to do it relatively quickly. With the holiday approaching, Mr. McGinley, I will try not to keep you waiting too long.

MR. MCGINLEY: Thank you, Your Honor. I appreciate that.

THE COURT: Thank you.

And I will move next to the defendant's motion that is also scheduled for hearing here to waive the Speedy Trial Act, counsel.

And, Mr. McGinley, if you want to leave counsel table, you're welcome to do so.

MR. MCGINLEY: Thank you, Your Honor.

THE COURT: Yes, sir. Have a good day.

Counsel.

MR. TAYLOR: May it please the Court, my name is Bill Taylor.

THE COURT: Mr. Taylor.

MR. TAYLOR: We greatly appreciate the privilege of being before you this morning in this lovely courtroom.

As you know, when Mr. Blankenship made his initial appearance, a schedule was set by the magistrate which required motions to be filed by the end of December and set a trial date at the end of January.

Our request is for relief from that schedule and for the Court to set a reasonable schedule for the filing and

hearing on motions and the trial.

I'm prepared to discuss in some detail what that involves from our point of view, as we have suggested, a longer period of time than is permissible under the rules but which the Court can, but which the Court can, of course, allow.

And I -- if the Court will indulge me, I did want to observe that we have been this morning arguing about a motion that hasn't yet been filed. But --

THE COURT: The Court's well aware of that, Mr. Taylor.

MR. TAYLOR: We are all aware that to provide Mr. Blankenship a fair trial will require diligent efforts by all of the parties to this case. And we are also aware that the Court has to balance important interests that Mr., that counsel for the media has articulated which the Court has responded to and which make it, make it difficult to, to decide the issues which this case presents.

I'm not going to reargue the extent of the publicity except to tell you that there's no one in this room who doesn't understand that Mr. Blankenship's reputation in this district and in this division is affected -- has been the subject of controversy for more than 30 years as a strikebreaker, as a controversial political contributor, as a contrarian on political issues, and as an enemy of the

United Mine Workers.

There is -- so, to put this issue properly before the Court, we have to do the necessary research, surveying, and polling so that we're not just talking about our anecdotal view about -- our guesswork about how intense the publicity has been and how deep it has affected the opinions of the citizens of this division.

We are obliged under the case law and as responsible advocates to put to the Court a reasonably scientific demonstration that the publicity is per se, per se prejudicial and so intense that *voir dire* will not be an adequate remedy.

We're not suggesting that the Court should decide that issue today one way or the other. I think we rather prefer that you -- that we -- that no one make any pre-judgments about it, including the Government.

But in order for us to do that, we need time. We, we don't exaggerate. We're not exaggerating the need for our, for us to put this motion together. That's why we've asked for February the 20th.

In addition, Your Honor, we have a, a large number of, of attacks on the sufficiency of this indictment which is, in a word, aggressive and imaginative. This is a very unusual case, a very unusual set of charges in which a man is accused of a willful conspiracy to commit mine safety

violations in a mine where he never has been present.

THE COURT: Mr. Taylor, you're anticipating motions to dismiss?

MR. TAYLOR: Yes.

THE COURT: You're anticipating a motion for a change of venue?

MR. TAYLOR: Yes.

THE COURT: What efforts have been made towards the filing of those motions given the existing trial date?

MR. TAYLOR: As hard as we can go.

THE COURT: And with respect to the motion for a change of venue that you indicated just a moment ago about the information that would be necessary to put before the Court, what efforts have been initiated to get that in a posture to present the actual motion?

MR. TAYLOR: We have, we have obtained -- we've retained the necessary consultants and polling experts. They have not been able to begin, but they are about to begin that process. But, you know, you have to not only get the polling, but you also have to accumulate the press.

THE COURT: I understand.

MR. TAYLOR: We have to put before the Court the nature of the press as well as its impact. And the polling just shows you the impact.

THE COURT: You intend to file a motion for change

of venue. You intend to file motions -- and I say motions given your statement -- to dismiss. Other pre-trial motions you're anticipating that in your position and from your perspective necessitates any type of delay plea, the motions?

MR. TAYLOR: I'm sorry?

THE COURT: Any other motions that you intend to make pre-trial that in your opinion and from your perspective necessitates a delay of the trial date? Are there others?

MR. TAYLOR: Well, I'm just talking about the motions date I guess, I guess if you grant our relief in connection with the motions deadline.

But, Your Honor, 60 days to trial and 30 days to file these motions is unreasonable in any, under any scenario. We can't possibly be ready to try this case by the end of January. We can't -- we can't put these motions together by the end of December.

We have 15 to 20 honest to goodness direct attacks on this indictment which should succeed, nevermind the fact that, you know, you have two conspiracies. One is lopped into the other. You have public statements which are attributed to Mr. Blankenship, although he didn't author them and although they are the vaguest possible --

THE COURT: Without the editorial, Mr. Taylor, are

there other motions that from your perspective need to be filed that would necessitate the Court granting you the delay that you're asking for?

MR. TAYLOR: Yes.

THE COURT: There will be a day that I will listen to or read, at the very least, the comments with respect to the adjectives that are being used.

MR. TAYLOR: Yes.

THE COURT: But I simply want to know today in terms of substance what else, in your opinion, needs to be done that would necessitate the delay that you're requesting?

MR. TAYLOR: Well, first of all, we need the time to file the motions. I suspect the Government is going to ask for time in excess of that which is granted by the rules, and they will need it. And, so, a timetable of the sort which now exists is simply impossible.

Now, in terms of a trial date, we're prepared to discuss what's necessary for us to be ready for trial. That is a much more complicated story, Your Honor. We, we need a year to prepare to defend this case.

Now, a year sounds like a long time. But the Government's had four and a half years to bring this indictment. They have provided us most recently in electronic form with documents which total almost

four million pages. And that's not all. I would like to actually hand to the Court the itemization of the discovery which is available if I may.

THE COURT: Yes, sir.

MR. TAYLOR: Most of it refers to Bates numbers. Mr. Ruby, this is, this is the --

So, I'm sure you'll want to keep it under seal. But this is the list which we have been provided thus far --

THE COURT: Thank you.

MR. TAYLOR: -- of materials.

THE COURT: I have -- and I should have stated this to you earlier, Mr. Taylor, in all fairness, reviewed your motion to -- and I will say to waive the client's rights under the Speedy Trial Act. I've reviewed all of that, the response, the reply such that I'm aware of those arguments.

I believe that any delay in the deadline for filing motions will obviously necessitate a delay in the actual trial date which is why I wanted you to be able to place on the record any motions that you intend to file that you believe requires a delay.

You have indicated various motions to dismiss, a motion to change venue. Are there others?

MR. TAYLOR: There are numerous motions to dismiss. There's a motion for a bill of particulars,

motions for -- motions to strike allegations in the indictment, motions that, that address imperfections in the indictment. They are all meritorious and they're all substantial. There are 15 to 20 in number.

And, frankly, as a matter of, of work load -- we've only been in this case for a month. We are, we are playing catch-up. I'm not telling you that we don't know anything about this case, but we didn't have the kind of interaction with the United States Attorney's Office which you often have before an indictment is brought so that we had some anticipation of what we would be, were being asked to do.

So, we need a, a period of the sort that I have asked for the filing of those motions and for the Government to respond to them. And, frankly, then for the Court to hear argument or to decide them.

And that's going to take us, in my professional judgment, Your Honor, -- and I'm not here to exaggerate or impose upon the Court or seek delay for its own sake, but simply to -- it will take us into February to get done what needs to be done on the transfer motion, that is, dealing with the outside issues of that, and the preparation and filing of responsible motions that the Court will, I think, grant.

But if the Court is interested in discussing beyond that a reasonable date for trial, I'm not urging that you do

that. One approach would be to see where we are at the end of, at the end of motions. But it would -- if we're going to talk about a reasonable date for trial, we've got a lot of work to do.

THE COURT: All right. Thank you, Mr. Taylor. Any response, counsel? Mr. Ruby?

MR. RUBY: Yes, Your Honor. Thank you.

I'll just say at the outset -- and I'm not going to get into the business of arguing motions that haven't been filed yet and may or may not be filed. I'll just note for the record that, that the United States disagrees with the various characterizations that, that have been made by defense counsel of infirmities or problems in the indictment. I'll leave it at that. We can discuss the substance of those if and when those motions are filed later on.

With respect to the, the specific request that the defense has made to continue the, the motions deadline until sometime in late February, I haven't heard anything, Your Honor, from defense counsel that leads me to believe that a continuance of that magnitude is necessary.

The United States is -- we're not trying to be unreasonable, Your Honor. We are -- we'll represent that we will not oppose a brief, and I'll emphasize brief, continuance of the motions deadline which is currently set

for, I believe, 13 days from now because -- in part because the defense has represented that they intend to take a poll.

I don't see why it should require two months to -- and that's the major source of delay. I don't see why it should take two months to take a poll, to collect newspaper articles that have been written in connection with this case and put those together in a form that the Court can consider in a motion, particularly since, as Mr. Taylor's represented, the defense has already been diligently working at those tasks for the month since the indictment.

And, so, on that particular issue, the timing of the motions hearing, to summarize, Your Honor, the United States could, could see its way clear to, to a brief continuance, but not the sort of continuance until late February that the defense is requesting.

As to the timing of trial -- and I don't know if the Court wants to -- well, I believe, as the Court indicated, if there is going to be a change in the motions deadline, I think it's going to necessitate a change in the trial date.

I don't believe, Your Honor, -- I know the defense motion requested, at least pending a hearing, and maybe this hearing resolved the request that they made, the defense motion had requested an open-ended trial date.

I don't believe the Court can do that under the Speedy Trial Act. I believe that a date certain does need to be

set for trial.

I, I certainly don't believe -- the United States certainly doesn't believe that it's going to take us a year, or is going to take the defense a year to get ready to try this case, Your Honor.

The -- and, and there's a discussion, of course, of the documents that the defense, that the defense mentioned in the United States' written response which I know that the Court has read. I'm going to talk about those if Your Honor will indulge me just a bit.

After the explosion at UBB Massey and later Alpha, which took control of Massey's operations, made a very broad production of documents to the United States. Most of those documents are not documents that the United States would have been required to produce in this case. They're not documents that we're going to use in our case-in-chief. They're not *Brady*. They're not *Giglio*. They're not *Jencks*.

They are -- for example, Your Honor, a great many of them are routine daily reports on performance statistics that were kept at Massey's various mines and that were e-mailed every day to a long list of officials at Massey.

Others are documents that were collected in connection with investigations of other officials at Massey, officials other than the defendant in cases that the Court, some of which at least the Court is aware of.

The United States decided notwithstanding that to err very far on the side of inclusiveness in its production because we didn't want the defense to complain down the road that we didn't turn over something that we should have.

But the indictment lays out with specificity the allegations against the defendant. And, as a result, the defense ought to be able to quickly identify the documents that, that aren't closely connected to those allegations and move on from them.

Many of the key documents in addition, Your Honor, that show the defendant's guilt have already been identified for the defendant in grand jury materials that have been produced.

I'd also point out that the defendant has a unique and a tremendous advantage when it comes to both the documents and the witnesses in this case, which is that no one knows how things were done at Massey and who did them better than the defendant does.

The bulk of the documents that the United States has turned over to the defense are Massey documents, documents that the defendant either personally handled or documents that were generated in business processes that he's very familiar with.

If there are documents that can show, for example, that -- I won't go into specifics. But if there are

documents out there that can refute the allegations that are made in the indictment, then the defendant is in a very good position to know where those are and how to find them.

It there are witnesses, similarly, who can refute the allegations that are made in the indictment, then the defendant who, who ran the company where these events took place for many, many years will know where they -- who they are and where to find them.

Your Honor, I would also point out -- and this is something that we did not include. I think there may have been a reference in our written submission to the fact that many of the documents are -- in the production are duplicates. We were able yesterday to get some more specific information on that for the Court's benefit.

At least 90,000 of the documents that the United States produced to the defense are duplicates of other documents in the production. Now, typically this happened where an e-mail was sent to multiple recipients. There were multiple people on the "to" list or the "cc" list in the e-mail within Massey. And Massey or Alpha turned over multiple copies to the United States of that same e-mail.

The United States produced all these documents to the defense again so that we are not accused later on of holding something back. But defense counsel has access, just as the Government does, to software that is able to identify these

duplicates and allow them to, to avoid reviewing these extra copies.

On that note, Your Honor, I'd also point out that the defendant has access to, to virtually unlimited resources to review the materials that have been produced and to prepare this case.

And he has -- and my, my compliments to Mr. Taylor and his colleagues. The defendant has hired one of the very best law firms in the entire country to represent him with dozens of superb lawyers and access to many more lawyers who specialize in reviewing documents.

It's not uncommon for firms of the caliber of defense counsel to use dozens of reviewers on large sets of documents with high-tech software to help make it go faster and to capably handle sets of documents that are significantly larger than the one that's involved here.

Finally, Your Honor, I'd note that -- and this is pointed out in our written submission as well. I'd note -- and I know the Court is well aware of this. The public also has an interest in a speedy trial here.

The public has a well-established interest in prompt proceedings in criminal cases for a variety of reasons, including the need to deter criminal conduct by others.

I'd ask the Court to be vigilant against -- as this proceeding goes along to be vigilant against requests for

delay for the sake of delay or just to make things easy for the lawyers.

Delay would, to some extent, make life easier for all the counsel in this case. And that's true in just about any case, including counsel for the United States. But our comfort is not a reason to deny the public its right to proceedings that are as prompt as possible.

THE COURT: Anything further?

MR. RUBY: No, Your Honor.

THE COURT: Mr. Taylor, is there anything you want to offer in addition before we close?

MR. TAYLOR: Yes, Your Honor.

We've been talking this morning about a fair trial. There are at least two important elements to that. One is the ability to select a fair and impartial jury, and the other is to have the effective assistance of counsel.

This indictment, as much as my colleagues would like to describe it as simple and straightforward, is not. It, for example, accuses Mr. Blankenship of a conspiracy willfully to commit violations of the Mine Safety Act, 850 of them in number.

Now, you and I know, as does Mr. Ruby, that mine safety violations come in all forms. Some are inadvertent. Some are minor. Some are more serious. And some are, are completely in spite of everybody's efforts.

We've got to look at every one of those. We have to defend Mr. Blankenship from the allegation that he conspired willfully to commit mine safety violations which are alleged in this indictment to number in the hundreds. We have to defend him against that allegation by looking at those violations themselves.

And there must be hundreds of witnesses. The case agent testified that he interviewed over 100 witnesses. They got production from 23 sources. We've got 23 immunity agreements, Your Honor.

This is -- it may be just 43 pages, but by the time you get to: What are these -- what do these citations, safety citations involve? Is the cause of them -- what's the cause of them? The indictment says production and budgeting decisions. Well, who's responsible for the budgeting decisions? What is this company's attitude toward safety?

This is an accusation that Mr. Blankenship and the company put production over safety, which is not true. But we can't defend these allegations without taking the time to -- and finding these witnesses. Mr. Blankenship does not run this company and hasn't since 2010. He has no particular access to, to witnesses. And he is prohibited, as you know, from speaking to witnesses.

So, delay is a word that is used when people are trying to find some reason to stave off the inevitable. What we're

telling you is the effective role -- our effective assistance to Mr. Blankenship requires that we do a lot of work, that we interview witnesses, that we determine what these violations consist of, whether there is a causal relationship, whether, whether experts agree. And we can't do that on this, this kind of timetable. Nobody could.

So, with all due respect, Your Honor, I do not, I do not exaggerate the difficulty that we have or the need for constitutionally effective defense in this case for us to have time to prepare.

THE COURT: All right, gentlemen, I'll give consideration to your arguments and I will enter a written order.

However, I am going to, Mr. Taylor, grant your motion to the extent that I am going to extend the deadline for the filing of motions, finding good cause has been stated. I will give consideration to both of your arguments and enter a written order with a new deadline in it. You all have a good day.

MR. RUBY: Thank you, Your Honor.

(Proceedings concluded at 11:02 a.m.)

I, Lisa A. Cook, Official Reporter of the United States District Court for the Southern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter.

s\Lisa A. Cook — January 6, 2015

Reporter — Date